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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

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9 MICHAEL EUGENE HUBER,
10 Petitioner,
11 vs.
12 WARDEN BACA, et al.,
13 Respondents.

Case No. 3:14-cv-00083-RCJ-VPC

ORDER

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15 Petitioner has submitted an application to proceed in forma pauperis (#1) and a petition for a
16 writ of habeas corpus pursuant to 28 U.S.C. § 2254. The court finds that petitioner is unable to pay
17 the filing fee. The court has reviewed the petition pursuant to Rule 4 of the Rules Governing
18 Section 2254 Cases in the United States District Courts. Petitioner will need to show cause why the
19 court should not dismiss this action as untimely or as a successive petition.

20 Congress has limited the time in which a person can petition for a writ of habeas corpus
21 pursuant to 28 U.S.C. § 2254:

22 A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a
23 person in custody pursuant to the judgment of a State court. The limitation period shall run
from the latest of—

24 (A) the date on which the judgment became final by the conclusion of direct review or the
expiration of the time for seeking such review;
25 (B) the date on which the impediment to filing an application created by State action in
violation of the Constitution or laws of the United States is removed, if the applicant was
prevented from filing by such State action;
26 (C) the date on which the constitutional right asserted was initially recognized by the
Supreme Court, if the right has been newly recognized by the Supreme Court and made
retroactively applicable to cases on collateral review; or
27 (D) the date on which the factual predicate of the claim or claims presented could have been
discovered through the exercise of due diligence.

1 28 U.S.C. § 2244(d)(1). If the judgment is appealed, then it becomes final when the Supreme Court
2 of the United States denies a petition for a writ of certiorari or when the time to petition for a writ of
3 certiorari expires. Jimenez v. Quarterman, 555 U.S. 113, 119-20 (2009). See also Sup. Ct. R.
4 13(1). Any time spent pursuing a properly filed application for state post-conviction review or other
5 collateral review does not count toward this one-year limitation period. 28 U.S.C. § 2244(d)(2).
6 The period of limitation resumes when the post-conviction judgment becomes final upon issuance
7 of the remittitur. Jefferson v. Budge, 419 F.3d 1013, 1015 n.2 (9th Cir. 2005). An untimely state
8 post-conviction petition is not “properly filed” and does not toll the period of limitation. Pace v.
9 DiGuglielmo, 544 U.S. 408, 417 (2005). A prior federal habeas corpus petition does not toll the
10 period of limitation. Duncan v. Walker, 533 U.S. 167, 181-82 (2001). Section 2244(d) is subject to
11 equitable tolling. Holland v. Florida, 560 U.S. 631, 645 (2010). “[A] ‘petitioner’ is ‘entitled to
12 equitable tolling’ only if he shows ‘(1) that he has been pursuing his rights diligently, and (2) that
13 some extraordinary circumstance stood in his way’ and prevented timely filing.” Id. at 649 (quoting
14 Pace, 544 U.S. at 418). Actual innocence can excuse operation of the statute of limitations.
15 McQuiggin v. Perkins, 133 S. Ct. 1924, 1928 (2013). “[A] petitioner does not meet the threshold
16 requirement unless he persuades the district court that, in light of the new evidence, no juror, acting
17 reasonably, would have voted to find him guilty beyond a reasonable doubt.” Id. (quoting Schlup
18 v. Delo, 515 U.S. 298, 329 (1995)). “[A]ctual innocence’ means factual innocence, not mere legal
19 insufficiency.” Bousley v. United States, 523 U.S. 614, 623 (1998). The petitioner effectively files
20 a federal petition when he mails it to the court. Stillman v. Lamarque, 319 F.3d 1199, 1201 (9th
21 Cir. 2003). The court can raise the issue of timeliness on its own motion. Day v. McDonough, 547
22 U.S. 198, 209 (2006); Herbst v. Cook, 260 F.3d 1039, 1043 (9th Cir. 2001).

23 On March 2, 2005, petitioner was convicted in state district court of two counts of sexual
24 assault, one count of attempted sexual assault, one count of robbery, one count of battery with intent
25 to commit a crime, and one count of first-degree kidnaping. Petitioner appealed, and the Nevada
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1 Supreme Court affirmed on January 12, 2006. The judgment of conviction became final for the
 2 purposes of § 2244(d)(1) on April 12, 2006.¹

3 On July 10, 2012, petitioner filed in the state district court a motion for leave to file a motion
 4 for modification of sentence. The state district court denied the motion on July 31, 2012, but found
 5 a clerical error in the judgment of conviction. The judgment stated that petitioner was convicted
 6 pursuant to a plea of guilty, but petitioner went to trial and was found guilty by a jury. A second
 7 amended judgment of conviction was filed on August 13, 2012.

8 On February 6, 2013, petitioner filed a post-conviction habeas corpus petition in the state
 9 district court. The state district court determined that the petition was untimely pursuant to Nev.
 10 Rev. Stat. § 34.726(1) and denied the petition. Petitioner appealed. The Nevada Supreme Court
 11 affirmed for the same reason on January 16, 2014. Remittitur issued on February 13, 2014.

12 Petitioner mailed his federal habeas corpus petition to this court on February 5, 2014.

13 On its face, the petition is untimely. The judgment of conviction became final on April 12,
 14 2006, and the one-year period of § 2244(d)(1) expired at the end of April 12, 2007. Even if
 15 petitioner's sentence-modification motion and state habeas corpus petition could toll the period of
 16 limitation pursuant to § 2244(d)(2), the period had expired before petitioner filed the motion or the
 17 petition, and there was no time left to toll. Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001).
 18 Petitioner has commenced in this court two other habeas corpus actions that challenged the same
 19 judgment of conviction,² but federal habeas corpus petitions are ineligible for tolling under
 20 § 2244(d)(2). Petitioner will need to show cause why the court should not dismiss this action
 21 because it is untimely. Petitioner notes in the petition that a good claim of actual innocence can
 22 excuse the operation of the one-year period, but he does not allege what evidence, not presented at
 23 trial, would have led no juror to have found him guilty beyond a reasonable doubt. He will need to
 24 correct that omission in his showing of cause.

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 27 ¹The state district court entered an amended judgment of conviction on August 15, 2005, to
 correct the sentence for one of the counts.

28 ²Huber v. Palmer, 3:11-cv-00600-LRH-WGC; Huber v. Palmer, 3:11-cv-00516-LRH-VPC.

1 The petition also appears to be successive. In Huber v. Palmer, 3:11-cv-00516-LRH-VPC,
2 petitioner challenged the same judgment of conviction that he challenges in this action. The court
3 dismissed the earlier petition because, among other reasons, it too was untimely. “[D]ismissal of a
4 section 2254 habeas petition for failure to comply with the statute of limitations renders subsequent
5 petitions second or successive for purposes of . . . 28 U.S.C. § 2244(b).” McNabb v. Yates, 576
6 F.3d 1028, 1030 (9th Cir. 2009). Consequently, the petition in this action is a second or successive
7 petition. Petitioner must first obtain authorization from the court of appeals before this court can
8 consider his petition. 28 U.S.C. § 2244(b)(3). It does not appear that petitioner has obtained that
9 authorization. Petitioner will need to show cause why the court should not dismiss this action
10 because it is second or successive.

11 IT IS THEREFORE ORDERED that the application to proceed in forma pauperis (#1) is
12 **GRANTED**. Petitioner need not pay the filing fee of five dollars (\$5.00).

13 IT IS FURTHER ORDERED that the clerk of the court shall file the petition for a writ of
14 habeas corpus pursuant to 28 U.S.C. § 2254.

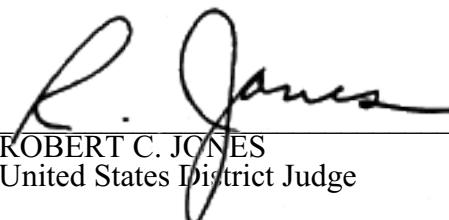
15 IT IS FURTHER ORDERED that petitioner shall have thirty (30) days from the date of entry
16 of this order to show cause why the court should not dismiss this action, either for being untimely or
17 for being a second or successive petition. Failure to comply with the court’s order will result in the
18 dismissal of this action.

19 IT IS FURTHER ORDERED that the clerk shall add Catherine Cortez Masto, Attorney
20 General for the State of Nevada, as counsel for respondents.

21 IT IS FURTHER ORDERED that the clerk shall electronically serve upon respondents a
22 copy of the petition and this order. No response is required at this time.

23 Dated: August 26, 2014.

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ROBERT C. JONES
United States District Judge